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Simon Drugda

—Simon Drugda, PhD Candidate at the University of Copenhagen

The Slovak Parliament recently passed a legislative rider to extend the length of the silence period, which prohibits publication of opinion polls before an election. Slovak electoral rules had previously prohibited political campaigning and the publication of opinion polls 14 days before an election taking place. The new legislation makes the Slovak moratorium “third-longest in the world after Cameroon and Tunisia,” according to the Slovak Academy of Sciences.[1]

The legislative change was widely criticized as unconstitutional, not least because legislative riders that are materially unrelated to the proposed law are prohibited by Article 93(3) of Standing Orders of the Parliament. The President of the Republic, therefore, decided to veto the extension on the grounds that the extended silence period disproportionately infringes the information rights of citizens and media. The President also declared that she would challenge the legislation in court and request an interim injunction against its effect if the Parliament were to overturn her veto.

The presidential veto has only a suspensive effect in law and can be overturned by a simple majority of all MPs (76 out of 150) pursuant to Article 84.3 of the Constitution. On November 26, the Parliament overturned the veto against expectations of most legal scholars and political observers. The Parliament has to publish the new electoral rule in the official gazette, which will enable the President to challenge the legislation at the Constitutional Court.

This contribution first explores comparative case-law on the extension of the silence period and then critically examines the constitutionality of the 50-day silence period in the Slovak law. This is not a difficult case in substance. The Slovak Constitution, as well as the European Convention of Human Rights, only allow the limitation of information rights if the restrictive measure pursues a legitimate aim, is necessary, and proportionate. The 50-day silence period fails to meet all of these criteria and is thus clearly unconstitutional.

Extension of the Silence Period in Comparative Practice

The silence period, “electoral blackout,” or also the “day of reflection” is a short time “preceding the elections to allow voters to absorb and digest all the information received during” the campaign without pressure.[2] The dissemination of partisan electoral messages during that, usually short, time is restricted. Silence periods affect the right of voters to receive information, which is necessary for them to make an informed decision

at the ballot box. Without access to information about the behaviour, character, or public support of political actors, the capacity of voters to effectively exercise their right to vote diminishes. Silence periods also affect the candidates' right to impart information to the electorate, and the freedom of expression of the media, which are both integral elements of free and fair elections in a democratic society.

There is considerable comparative case law and legal commentary on the subject of silence periods. Most importantly, the Venice Commission and the OSCE issued a joint opinion on changes to the electoral legislation in Ukraine in 2009. The Ukrainian electoral law had included a provision for a 15-day blackout period, which was later reduced to one day based on the constitutional advice from the two supranational bodies. The Commission and the OSCE noted that the shorter silence period "brought the restriction on publication of opinion polls in line with internationally accepted principals for the length of a silence period."^[3]

Moreover, at least two constitutional courts in the EU Member States recently struck down unduly restrictive laws on access to and the dissemination of information before the election. The Constitutional Court of Hungary found unconstitutional an eight-day silence period on the publication of opinion polls in 2007 and went even further to strike down a six-day silence period in 2013. Similarly, the Constitutional Court of Slovenia found unconstitutional a seven-day silence period on the publication of sociological opinion polls in 2011. Both courts recognized that silence periods are legitimate tools to allow citizens a short time for contemplation, but the length of the period in each of the three cases was judged disproportionately excessive. The Slovenian Constitutional Court also questioned whether, in the digital age, any such regulation still has a meaning.

Silence Period in Slovakia

Slovak MPs who authored the change stated that they wish to protect the public from opinion polls that report "significantly different" results. Such disparities confuse the voter. The lawmakers explained: "We believe that in this case, the law does not restrict the voter's right to information, but rather seeks to protect the voter from misinformation and targeted political messages."^[4]

Contrarily to the opinion of the Parliament, the blackout measure does restrict both the right to disseminate and access information in the public sphere. Pursuant to Article 26(3) of the Slovak Constitution and the European Convention of Human Rights, information rights and the freedom of expression may be lawfully limited only if it is necessary to protect state security, law and order, health and morality, and rights and freedoms of others. The stated justification for the legislation does not fit the enumerated grounds for legitimate restriction of the right.

Furthermore, any such limitation on information rights must adhere to the constitutional principle of proportionality, which means that the restrictive measure must be appropriate and necessary to achieve the pursued aim. The legislator can only select the least intrusive means to achieve the pursued goal.

A 50-day silence period is clearly disproportionate to the goal of protecting the voter from the publication of inaccurate opinion polls. The legislator could have instead implemented neatly tailored rules requiring pollster to “offer the public adequate information to make a judgement on the value of opinion polls.” According to the Venice Commission, such information can include the name of the individual or the entity, who commissioned the poll, information on the selected methodology, sample, margin of error, and other criteria to increase transparency and quality of opinion polls.[5] The Slovak legislator instead opted for an indiscriminate prohibition of the publication of opinion polls, for almost half of the whole campaign period.[6]

Conclusion

The extension of the silence period for publication of opinion polls to 50-days before an election in Slovakia does not follow comparative best practice and is clearly disproportionate to the pursued aim. Since there is only a little time until the next general election, which is due on February 29, 2020, it would have been preferable if the Parliament heeded the veto of the President. However, the Parliament decided to re-enact the legislation, despite considerable criticism of the extended silence period by the other branches of the government and independent control bodies. The Constitutional Court will have act quick to ensure the upcoming general election is not affected by the ill-fated change to the electoral rules.

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[1] “Slovakia’s president digs in to fight law banning pre-election polls” (*Reuters*, 6 November 2019) <<https://www.reuters.com/article/us-slovakia-politics/slovakias-president-digs-in-to-fight-law-banning-pre-election-polls-idUSKBN1XG25S>>

[2] *Guidelines on media analysis during election observation missions*, OSCE/Venice Commission CDL-AD(2009)031, para 64, accessible at <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2009\)031-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2009)031-e)>

[3] *Joint Opinion on the Draft Law No. 3366 about Elections to the Parliament of Ukraine*, OSCE/Venice Commission CDL-AD(2009)028, para 54, accessible at [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2009\)028-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2009)028-e)

[4] Explanatory memorandum to the legislation, accessible at <<https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=472794>>

[5] *Guidelines on media analysis during election observation* (n3) para 63

[6] Which lasts for at least 110 days. Pursuant to Article 56(1) of the Act No. 180/2014 Coll. on the Conditions for the Exercise of the Right to Vote